No. 95-388

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,
Petitioners,
v.
PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL AND MAJOR LEAGUE BASEBALL PLAYER RELATIONS COMMITTEE, INC. IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE OFFICE OF THE COMMISSIONER OF BASEBALL AND MAJOR LEAGUE BASEBALL PLAYER RELATIONS COMMITTEE, INC. IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37 of the Rules of this Court, the Office of the Commissioner of Baseball and the Major League Baseball Player Relations Committee, Inc. submit this brief as amici curiae in support of respondents. Respondents and petitioners have both consented to the filing of this brief, and the letters of consent have been lodged with this Court.

INTEREST OF AMICI CURIAE

The players in the four major professional sports in the United States, baseball, basketball, football and hockey, are unionized, and the members of each league have a long history of engaging in multiemployer collective bargaining. In professional baseball ("Baseball"), the history extends over 30 years. The Major League Baseball Player Relations Committee, Inc. ("PRC") is the collective bargaining representative of the 28 Major League clubs ("clubs"). The Office of the Commissioner of Baseball ("Commissioner's Office") is responsible for the centralized administration of the game and oversees the activities of the PRC.

If petitioners succeed in their effort to overturn the decision of the court of appeals, labor relations in Baseball are likely to be adversely affected. The fact that Baseball's status under the antitrust laws is different from that of the other major professional sports, *see Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), will not eliminate this impact.

Collective bargaining in professional sports, as in many other industries, is strongly influenced by pattern bargaining. The results of collective bargaining in the National Football League ("NFL"), the National Basketball Association ("NBA") and the National Hockey League ("NHL") have a serious impact on the course of negotiations in Baseball. As the court of appeals recognized, the legal standard advocated by the petitioners would give "unions a powerful new weapon." Appendix to petition for *certiorari* ("Pet. App.") at 20a. This, in turn, undoubtedly would alter the content of the agreements negotiated not only by the NFL but also by the NBA and the NHL. Thus, although this Court's decisions place Baseball in a different legal posture, the Court's resolution of the important issues presented by this case can

alter the course of future labor relations in all professional sports, including Baseball, by changing the patterns established in collective bargaining. For this reason, the Commissioner's Office and the PRC have a strong interest in the Court's consideration of the issues raised in this case.

Further, the petitioners and certain amici have made assertions concerning the impact that Baseball's antitrust exemption has had on the collective bargaining process. Brief for Petitioners at 44; Brief of the National Hockey League Players Association, National Football League Players Association, Major League Baseball Players Association and National Basketball Players Association (collectively the "Players' Unions") as Amici Curiae in Support of Petitioners ("Players' Brief") at 15-18. The Commissioner's Office and the PRC are uniquely situated to respond to these assertions, which they believe to be demonstrably inaccurate, and to provide a perspective on this topic that will assist the Court in resolving the issues presented by this case.

SUMMARY OF ARGUMENT

For more than thirty years, Baseball and its players have engaged in multiemployer collective bargaining. Baseball has an industry-specific, antitrust exemption reaffirmed by this Court in *Flood v. Kuhn*, 407 U.S. at 282-84. Contrary to the assertions of petitioners and the Players' Unions, there is no evidence that the existence of Baseball's antitrust exemption has had an adverse impact on the bargaining process in Baseball. Although Baseball (like many other industries) has had strikes and lockouts, those disruptions should not be viewed as symptomatic of a problem in collective bargaining. Rather, the use of economic weapons is "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

Moreover, a review of the history of collective bargaining in Baseball demonstrates that the clubs have not relied on Baseball's antitrust exemption as a justification for engaging in conduct outside the normal collective bargaining process. In fact, the course of Baseball's collective bargaining has been dictated by historical and economic factors, unrelated to the industry-specific exemption.

The interpretation of the nonstatutory labor exemption advocated by petitioners would disrupt the process of multiemployer bargaining that all professional sports have used to order their economic affairs.[1] The threat of antitrust litigation post-impasse would lead to legal posturing at the bargaining table that would chill negotiations. Moreover, potential antitrust liability would leave employers with little choice but to lock out their employees before undertaking any possible antitrust risk, thus increasing disruptions in the sports industry.

ARGUMENT

I. BASEBALL'S ANTITRUST EXEMPTION HAS NOT HAMPERED OR DISRUPTED THE PROCESS OF FREE COLLECTIVE BARGAINING FOSTERED BY THE NATIONAL LABOR RELATIONS ACT.

More than 70 years ago, this Court first held that the business of Baseball is not subject to the antitrust laws. *Federal Baseball Club v. National League*, 259 U.S. at 208-09. Since 1922, the Court has twice reconsidered Baseball's immunity, and on each occasion it has adhered to its earlier decision. In *Toolson v. New York Yankees*, 346 U.S. at 357, the Court stated that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." In *Flood v. Kuhn*, 407 U.S. at 282-84, the Court reaffirmed

[1] Multiemployer bargaining is the only appropriate bargaining construct for a professional sports league, and it is significant that all of the Players' Unions insisted on multiemployer bargaining when organizing the leagues.

the apparent "anomaly" of exempting the business of Baseball from antitrust scrutiny, stating that "[w]e continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." [2]

The antitrust exemption reaffirmed in *Flood v. Kuhn* obviously is not an issue before the Court. However, in an effort to support their argument that the antitrust laws should be given unprecedented application during the collective bargaining process, petitioners assert that the *Flood v. Kuhn* exemption has caused instability in Baseball's labor relations. Brief for Petitioners at 44. *See also* Players' Brief at 16 (asserting that Baseball's antitrust exemption has caused "unstable, disruptive labor relations"). This assertion is not correct.

A. The History of Labor Relations in Baseball Is Similar to That in Other Industries and Provides No Indication That the Process of Collective Bargaining Has Been Adversely Affected by Baseball's Antitrust Immunity.

Petitioners attempt to create the impression that labor relations in Baseball have been uniquely problematic. The fact of the matter is that, during a 30-year bargaining relationship, Baseball has had two significant strikes, one in 1981 and another in 1994. There were also shorter disruptions in 1972, 1976 and 1985. These shorter disruptions, however, did not prevent the season from being played in its entirety.

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[2] Baseball is not the only industry in which the Court has reaffirmed an antitrust exemption because of Congress' failure to eliminate the exemption. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423-24 (1986) (exemption for rate-making by motor freight carriers), *reaff'g Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922).

As a matter of perspective, it is important to evaluate Baseball's labor relations experience in comparison to the experience in other industries. In recent memory, the NFL, the NBA and the NHL have all had labor disruptions with players or referees. Moreover, industries outside of sports, such as coal and steel to name just two, have had extended periods of poor labor relations marked by strikes that were more frequent, more bitter and more violent than anything that has ever occurred in Baseball. *See* Charles R. Perry, *Collective Bargaining and the Decline of the United Mine Workers* 197-233 (1984) (describing labor relations in the coal industry); John P. Hoerr, *And the Wolf Finally Came: The Decline of the American Steel Industry* 101-105 (1988) (describing labor relations in the steel industry). Because Baseball is the national pastime, its labor problems draw a disproportionate amount of attention. This attention, however, should not disguise the fact that Baseball's collective bargaining has been no worse than that in many other industries.

More important, the argument that Baseball's antitrust immunity has "caused" the work stoppages in Baseball during the last 30 years starts from the false premise that a work stoppage represents a failure in the collective bargaining process that must have been "caused" by some outside force (*i.e.*, the clubs' antitrust immunity in this case). As described in detail below, *see infra* pp. 8-10, this view has no support in the actual facts of Baseball's labor disputes. It is also contrary to the underlying rationale of the federal labor laws.

Congress did not view strikes and lockouts as collective bargaining "failures." Rather, this Court has said that the premise underlying the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* (1994), is that union and management "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties,

is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Insurance Agents*, 361 U.S. at 488-89. Under such a regime, "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of . . . the Act; it is part and parcel of the process of collective bargaining." *Id.* at 495. Indeed, the NLRA collective bargaining structure "is premised on the belief that collective discussion *backed by the parties' economic weapons* will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (emphasis added).

Given the NLRA's theory of free collective bargaining, it is not surprising that Baseball and the other professional sports are not the only employers in this country to experience work stoppages. A review of the Players' Brief would suggest that only professional sports leagues —or only industries that utilize multiemployer bargaining —have had labor disputes. To the contrary, industries in which collective bargaining takes place on an individual employer basis have also had tumultuous labor strife over time and in recent years. The United Auto Workers and Caterpillar, the United Paperworkers and A.E. Staley, and the United Rubber Workers and Bridgestone/Firestone (to name just a few) have been locked in particularly lengthy and contentious work stoppages over the last year or more. *See generally New Leadership Elected At AFL-CIO, End Of Major Labor Disputes Lead 1995 Events*, Daily Lab. Rep. (BNA) No. 7, at C-1 (Jan. 11, 1996) (summarizing conclusions to 30-month lockout at A.E. Staley, 17-month strike at Caterpillar and 10-month strike at Bridgestone/Firestone).

The fact that Caterpillar, A.E. Staley, and Bridgestone/Firestone (as single employers) do not have to fear a treble-damage antitrust lawsuit by the unions representing their employees if they continue terms of an expired agreement or unilaterally impose new terms after a lawful

impasse in bargaining no more "caused" these labor disputes than Baseball's antitrust immunity "caused" the work stoppages that Baseball has experienced. Rather, the "exercise [of economic weapons] . . . by the parties . . . is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"—not evidence of some inappropriate outside force or a "breakdown" of the collective bargaining process. *Insurance Agents*, 361 U.S. at 489.

B. The Course of Baseball's Labor Relations Has Been Dictated by Historical and Economic Factors Unrelated to Baseball's Antitrust Exemption.

Contrary to the assertions of petitioners and the Players' Unions, there is no reason to believe that the strikes and lockouts that have occurred in Baseball were related to Baseball's status under the antitrust laws. In fact, Baseball's history of labor relations is better explained by a confluence of special historical and economic factors.

To fully appreciate Baseball's special bargaining history, one must begin with the proposition that collective bargaining agreements in professional sports represent a "unique bundle of compromises." *Wood v. National Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987); *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 256 (S.D.N.Y.), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). This point is well illustrated by the NFL and the NBA. In both of these sports, the collective bargaining parties have reached the same essential compromise. The players received free agency, which increased individual bargaining power and player salaries. *See Wood*, 809 F.2d at 861. In return, the owners received an entry-level draft and a salary cap, which served "the interests of the employers in stabilizing salary costs and spreading talent among the various teams." *Id.*

Unfortunately, Baseball missed the opportunity to reach the kind of fundamental compromise achieved in the NBA and the NFL. In 1976, the players in Baseball

secured free agency rights through an arbitration. *See National and American Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Lab. Arb. Reps. (BNA) 101 (1976) (Seitz, Arb.).[3] Since 1976, Baseball, despite its special status under the antitrust laws, has had the most open and competitive free agency system in professional sports. *See generally* Paul D. Staudohar, *The Sports Industry and Collective Bargaining* 38 (2d ed. 1989) (characterizing Baseball's free agency system as "wide open"). Beyond the basic reserve system (which limits the ability of young players to change teams), Baseball's collective bargaining agreement, without a salary cap or similar mechanism, contains few, if any, provisions that reflect "the interests of employers in stabilizing salary costs and spreading talent among the various teams." *Wood*, 809 F.2d at 961.

Moreover, Baseball has certain unique economic characteristics that, when combined with its "wide open" system of free agency, have placed the smallest-market clubs in constant peril. Most important, there is great disparity in the revenues generated by the clubs. Because Baseball plays far more games than professional football, basketball or hockey, gate revenue—which is often closely correlated with local population—is a very important revenue source. Also because of the number of games, Baseball sells television rights not only nationally (like the NFL) but also locally. As one would expect, local television rights are much more valuable in large population centers. Due to these and other factors, Baseball has clubs that generate local revenues more than three times those of some of their competitors on the field.

The wide revenue disparity among the clubs causes difficulties because there is a single market for Baseball players. In that single market, the clubs with the most revenue set the price for free agent players. Clubs with

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[3] The right to arbitrate disputes over contract matters, of course, was a right that the players had won in collective bargaining.

less revenue are faced with the difficult choice of paying the market rate or losing their talent.[4]

The combination of Baseball's player compensation system and the revenue disparity in the industry has created serious economic issues in the game. In every round of negotiations since 1976, the clubs have sought changes designed to serve their interests in "stabilizing salary costs and spreading talent among the various teams." *Wood*, 809 F.2d at 961. Unfortunately, the players have viewed these efforts as an attempt to "roll back players' free agency rights. Players' Brief at 16.

It is a fundamental tenet of labor relations that the most difficult and contentious type of collective bargaining occurs when a union is asked to respond to changed or difficult economic circumstances in an industry. *See* James B. Dworkin, *Owners Versus Players: Baseball and Collective Bargaining* 35 (1981) (describing typical union reaction to effort to reform a collective bargaining agreement). The instability that petitioners perceive in Baseball's labor relations has not been caused by the fact that the industry is exempt from the antitrust laws but rather by the fact that, since 1976, the clubs have felt compelled repeatedly to seek fundamental reforms of Baseball's collective bargaining agreement in an effort to protect the weakest members of the industry. Given these factors and the extraordinary financial stakes involved, it is hardly surprising that Baseball has had difficult negotiations with its players' union, regardless of the industry's status under the antitrust laws.

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[4] A similar problem exists with respect to many of the players who are not eligible for free agency. Under Baseball's player compensation system, many non-free agents are eligible for the process of salary arbitration. A principal purpose of the salary arbitration process is to eliminate club-to-club variations in salary. *See* Marvin Miller, *A Whole Different Ball Game* 109 (1991). In fact, Baseball's salary arbitration system precludes the arbitrator from considering the financial position of a club in setting a player's salary. *See Silverman*, 67 F.3d at 1057-58.

II. THE KIND OF UNILATERAL ACTION THAT PETITIONERS MAINTAIN SHOULD BE SUBJECT TO ANTITRUST SCRUTINY HAS NOT PLAYED A SIGNIFICANT ROLE IN BASEBALL'S COLLECTIVE BARGAINING.

A review of the history of collective bargaining in Baseball demonstrates that the process has worked in the manner that Congress envisioned when it passed the NLRA. The clubs and players often have bargained hard. At times, economic force has been used. But in the end, the parties have reached new agreements. There is simply no evidence that Baseball's exemption from the antitrust laws has caused the clubs to have a special proclivity for unilateral action. In fact, history demonstrates that the clubs have not relied on Baseball's antitrust exemption as a justification for engaging in conduct outside the normal collective bargaining process:

• In 1972, the players engaged in a brief early-season strike in an effort to secure additional contributions to their pension plan. After just 13 days, "[a]s is true in most effective collective bargaining situations, both sides had to compromise to reach agreement . . . ." Dworkin, *Owners Versus Players* at 33. There was no threat or talk of unilateral implementation in 1972.

• The 1976 negotiations took place against the backdrop of the arbitration decision that granted baseball players free agency after essentially two seasons of service. *See National and American Leagues*, 66 Lab. Arb. Reps. (BNA) 101. The central issue in the negotiations was the length and contours of the new reserve system. *See* Dworkin, *Owners Versus Players* at 34. The clubs locked out the players during spring training "in the hopes of forcing them to reach a quick agreement." *Id.* Commissioner Kuhn, however, opened the camps, play commenced, and a negotiated agreement was reached in July. Again, there was no threat of a declaration of impasse or unilateral implementation.

• If the clubs had ever been inclined to act unilaterally, the 1980-81 negotiations provided a perfect opportunity. The collective bargaining parties engaged in protracted negotiations and, by May of 1980, it was clear that the parties were deadlocked on the single issue of "direct player compensation." [5] *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 516 F. Supp. 588, 591 (S.D.N.Y. 1981). Despite these developments, the clubs made no effort to act unilaterally. Rather, they reached an agreement with the Major League Baseball Players Association ("Players Association") that allowed the 1980 season to be completed uninterrupted and created a joint committee to attempt to resolve the direct player compensation issue. *Id.* at 591-92. The agreement also provided that, if the joint committee failed to resolve the player compensation issue, a proposal previously made by the clubs would become effective during the 1981 season and the Players Association would have the right to reopen the contract. *Id.* It was this reopener that led to the long strike in 1981.

• On August 6, 1985, after protracted negotiations, the players struck. As one commentator observed, however, "no one really wanted a strike . . . ," and a settlement was reached in just one day. Staudohar, *The Sports Industry and Collective Bargaining* at 57. There was no talk of unilateral implementation during the 1985 negotiations.

• In 1990, the clubs again attempted to use the leverage of a spring training lockout to force a quick agreement. The strategy was successful in 1990 in the sense that an agreement was reached without the loss of any regular-

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[5] Direct player compensation is an aspect of the free agency system in a number of professional sports. Under a direct player compensation provision, a team that signs a free agent who formerly played for another team is required to "compensate" the player's former team by providing that team with another player or, in some cases, a draft choice.

season games. Moreover, there was no threat of impasse or unilateral implementation.

• 1994 was the one round of collective bargaining in Baseball where impasse and unilateral implementation arguably played a role. While the clubs eventually took unilateral action, it came only after the Players Association had already been out on strike for four months. As such, it is clear that the unilateral implementation did not cause the strike. Moreover, the Players Association used its rights under the NLRA and the NLRB enforcement mechanism to reverse the clubs' 1994 unilateral implementation.

As the foregoing amply demonstrates, Baseball's antitrust exemption has had little or no impact upon collective bargaining. Under the system of industrial relations fostered by the NLRA, the clubs and the players have engaged in collective bargaining and, when necessary, exerted economic leverage in order to reach agreements. There is no evidence that Baseball's antitrust exemption made the clubs more prone than other employers to try to act unilaterally.[6] Equally important for present purposes, there is no reason to believe that injecting the threat of antitrust litigation into the bargaining process would have made Baseball's labor situation more "stable."

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[6] Certain amici have gone to rather unusual lengths to convince the Court that there is some relationship between Baseball's labor disruptions and its antitrust exemption. One group of amici actually attached the transcript of a television show where the President of the NFL, Neil Austrian, made certain comments about the impact of Baseball's exemption on the players' 1994 strike. *See* Players' Brief, Appendix at 2a. With all due respect to Mr. Austrian, he has no particular knowledge of Baseball, the events surrounding the 1994 strike, or labor relations. The amici's reliance on an offhand comment on a television show to support their argument shows how speculative that argument is.

III. APPLICATION OF THE ANTITRUST LAWS IN THE MANNER ADVOCATED BY PETITIONERS WOULD DESTROY MULTIEMPLOYER BARGAINING IN PROFESSIONAL SPORTS AND CREATE CHAOS.

As Congress and this Court have previously recognized, there is "cogent evidence that in many industries . . . multi-employer bargaining . . . [is] a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining." *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957) (referring to congressional debates on Taft-Hartley amendments to NLRA). In every major professional sport, multiemployer collective bargaining agreements establish uniform terms and conditions of employment such as roster sizes, scheduling rules and playing rules that are crucial to the competitive character of the enterprise.

Perhaps the most important component of the economic arrangements reached through collective bargaining in professional sports is the free agency/reserve system. *See Silverman*, 67 F.3d at 1061-62.[7] A free agency/reserve system is nothing more than a method of regulating the timing and circumstances under which players (*i.e.*, employees) can move from one team (*i.e.*, employer) to another. There are many reasons why such a system is vital to the stability of all professional sports: (1) the free agency/reserve system often determines the share of revenues going to teams and players; (2) the free agency/reserve system preserves a degree of roster continuity, which is important to maintaining fan interest; (3) the free agency/reserve system helps to ensure high-quality play by requiring that individuals practice and play with the same teammates for a certain period of time; and

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[7] As noted above, *supra* p. 8, in two major sports—football and basketball—the free agency/reserve system is accompanied by a salary cap.

(4) the free agency/reserve system allows teams to recoup development costs. *Id.* at 1061.

Because a free agency/reserve system regulates the interchange of employees among different employers, it would be difficult, if not impossible, to establish such a system in bargaining between groups of players and each single team.[8] Conversely, if multiemployer bargaining is disrupted in professional sports, it is difficult to imagine how the industry will be able to operate and what mechanism will perform the crucial functions now handled by the free agency/reserve system.

The unprecedented interjection of the antitrust laws into the collective bargaining process advocated by petitioners would destroy multiemployer bargaining in professional sports. Key components of the agreements commonly reached in the sports industry, including the free agency/reserve system and the salary cap system, would provide fertile ground for potential antitrust plaintiffs. The potential for antitrust liability would not only provide "unions with a powerful new weapon," Pet. App. at 20a, but it would also inevitably lead both bargaining parties to alter their conduct at the bargaining table to

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[8] In fact, there is a line of authority indicating that professional sports leagues are joint employers, rather than multiemployer groups. *See Major League Rodeo, Inc.*, 246 N.L.R.B. 743 n.2 (1979) (holding that Major League Rodeo and its constituent members constituted a joint employer bargaining unit); *North American Soccer League*, 236 N.L.R.B. 1317, 1319 (1978) (holding that soccer league and its member clubs were joint employers for bargaining purposes), *later proceeding*, 241 N.L.R.B. 1225 (1979), *enf'd*, 613 F.2d 1379 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980).

Consistent with this line of authority, the current Chief Justice has expressed the view that sports leagues have some of the characteristics of a "single enterprise." *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*). A finding that a sports league is a single enterprise would provide an alternative basis to conclude that the antitrust laws do not apply.

prepare for the inevitable onslaught of litigation. This kind of posturing cannot help but impede productive collective bargaining.

The fact that under the theory advocated by the United States and the Federal Trade Commission, the antitrust laws would become applicable only at impasse provides little solace.[9] Brief of the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioners at 9. As the Court has recognized, impasse is a state of affairs that can be brought about intentionally by one or both parties. *Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982). Under the interpretation of the nonstatutory exemption advocated by petitioners, a professional sports union could force the bargaining process to impasse and thereby create an impossible dilemma for the teams. At the point of impasse, the teams would have to choose between: (1) exposing themselves to potentially massive antitrust liability by continuing key collective bargaining provisions such as the free agency/reserve system; and (2) operating with no uniform arrangements with respect to the interchange of players among the various teams.

In fact, if petitioners' theory were accepted, there would necessarily be more, not less, "labor strife" or "chaos" in collective bargaining in professional sports. Despite the Players' Unions' generous advice to the leagues that "all that [they] need to do is to comply with the rule of reason and the antitrust laws in implementing their proposals," Players' Brief at 24, no league would

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[9] As an alternative, petitioners contend that the nonstatutory exemption should end upon expiration of a collective bargaining agreement. No federal court of appeals has ever accepted this position. This is hardly surprising given that, until impasse, employers are *required* by the labor laws to maintain the status quo on all mandatory topics of bargaining. *See NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). It is hard to imagine how conduct required by the federal labor laws would also violate the federal antitrust laws.

risk bankrupting its franchises by following such a foolhardy course of conduct. If, several years later when the antitrust action finally went to trial, an antitrust jury concluded that the implemented collective bargaining proposals were not "reasonable" terms, the treble-damage award would probably put some teams in the league out of business.[10] Nor would a league attempt to operate under the chaos that would exist if there were no uniform contract negotiating and signing rules or player allocation system. Therefore, petitioners' proposed rule of law would leave sports leagues with one and only one plausible course of action at the expiration of each collective bargaining agreement—to lock out the players until a new labor agreement is reached.

The Players' Unions acknowledge that, even under their misguided view of the antitrust laws' role in the collective bargaining process, a lockout (*i.e.*, a concerted refusal to employ a certain group of workers) by a multiemployer group would be lawful. Players' Brief at 24. As the court below, Pet. App. at 27a-28a, and the Second Circuit in *National Basketball Ass'n v. Williams*, 45 F.3d 684, 691-92 (2d Cir. 1995), *pet. for cert. filed*, No. 95-137 (July 24, 1995), pointed out, this Court's decision in *Buffalo Linen*, 353 U.S. at 94-96, mandates

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[10] The absurdity of petitioners' view of the role that the antitrust laws should play in the collective bargaining process may be best illustrated by the Players' Unions' acknowledgment that antitrust courts and juries would be judging the "reasonableness" of employer collective bargaining proposals if petitioners prevail in this case. Of course, this Court has held that Congress determined that the NLRB—the government agency in charge of enforcing the federal collective bargaining laws—would have no authority to pass on the reasonableness of a party's bargaining proposals. *See Insurance Agents*, 361 U.S. at 488; *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). Under petitioners' theory, as the Players' Brief freely acknowledges, federal courts and juries that may have no particular labor relations expertise would be doing precisely what Congress expressly determined would not be done by *any* governmental body.

such a result. *See also NLRB v. Brown*, 380 U.S. 278, 285 (1965). In fact, the Players' Unions opine that "a lockout [is a] particularly powerful weapon[] for employers in professional team sports." Players' Brief at 24 n.10. Regardless of whether the Players' Unions are right about the effectiveness of lockouts in this industry —and there is substantial reason to doubt their assessment—the lockout would certainly become the only rational employer response to the expiration of a collective bargaining agreement.

Thus, the "havoc to labor relations in professional team sports," Players' Brief at 6, that petitioners and the Players' Unions decry and purportedly seek to remedy through their petition to this Court would, in fact, be the state of affairs *mandated* by their proposed interjection of the antitrust laws into matters that Congress either regulated through the federal labor laws or "left for the free play of contending economic forces." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150 (1976) (internal quotation marks omitted).

In addition to passing on the reasonableness of collective bargaining proposals, the federal courts, under the interpretation of the nonstatutory exemption advocated by petitioners, would also have to make determinations as to the existence of an impasse. As the Court has recognized, impasse is a transitory state of affairs. *Charles D. Bonanno Linen Serv.*, 454 U.S. at 412. If petitioners' theory were adopted, courts would be forced into the unenviable position of evaluating when an impasse existed in order to determine whether a particular antitrust claimant has a cause of action. This in-depth involvement by the federal courts in labor disputes would again run contrary to fundamental policies underlying the NLRA and the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* (1994).

Finally, the notion that an individual sports franchise could avoid potential antitrust liability by imposing, at

impasse, terms and conditions of employment separate from the rest of the teams in the league is absurd. The entire purpose of a free agency/reserve system is to regulate the conditions under which individual players may move from team to team. It would simply be impossible for each team to impose its own version of a free agency/reserve system because those versions inevitably would not be compatible.

In sum, the entire professional sports industry has ordered its affairs in reliance on the long-standing federal labor policy that encourages multiemployer collective bargaining. To interject the antitrust laws into multiemployer bargaining would have severe structural repercussions in professional sports and other industries in which multiemployer bargaining has long been the norm. To avoid this result, the Court should reject petitioners' effort to seek a treble-damage antitrust recovery based on conduct authorized under the labor laws.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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